

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1978

~~78-392~~

DR. HAROLD TRACY, et ux.; BIG BEND COMMUNITY
COLLEGE, et al.,

Petitioners,

v.

ROGER R. RUTCOSKY and ROBERTA RUTCOSKY, hus-
band and wife,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE
WASHINGTON STATE SUPREME COURT

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FCR
BRIEF

Les could you
give me the date of
the W Sup Ct decision - it
must be in the Appendix -
Thank
Sheila

Supreme Court Review

Petition Filed:

Contingent Fees--Appropriated Funds--Ruling Below (WashSupCt., 1/ /78):

A community college's payment of a percentage fee to an individual who had prepared a ~~proposal~~ proposal under which the college was to provide educational services for Army personnel that was contingent upon the Army's accepting the proposal isn't barred by 10 U.S.C. §2306(b), which requires contractors to warrant that their contracts were not obtained under a contingent fee ~~arrangement~~ agreement; 10 U.S.C. §2306(b) isn't applicable since the college wasn't paid from money appropriated to the Army, but rather by assignment of ~~individual soldiers'~~ individual soldiers' Veterans Administration benefits directly to the college.

Question presented: Does the prohibition against contingent fee arrangements contained in 10 U.S.C. §2306(b) apply to an agreement to provide educational services to the United States Army, pursuant to the ~~Pre~~ Pre-Release Discharge Program authorized in ~~38 U.S.C. §§1695-1698~~ 38 U.S.C. §§1695-1698, through which tuition and fees are funded by Veterans Administration benefits assigned to a ~~college~~ college by matriculated military personnel? (Big Bend Community College v. ~~Rutcosky~~ Rutcosky, Sup. Ct. No. 78-392, 9/7/78)

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JURISDICTIONAL STATEMENT

Petitioner, BIG BEND COMMUNITY COLLEGE, an agency of the State of Washington, petitions this Court to issue a Writ of Certiorari to review the judgment of the Washington State Supreme Court entered in this proceeding in January, 1978. A petition for rehearing was denied and mandate issued by that court on June 9, 1978.

OPINIONS BELOW

Roger Rutcosky commenced this action in state court in August of 1974, suing Big Bend Community College (hereinafter referred to as BBCC), its

Board of Trustees, and President. Rutcosky requested, and the trial court ordered, that he was entitled to a contingent fee for a BBCC high school education proposal that had been accepted by the United States Army. Under that proposal, BBCC provided educational services for United States Eighth Army personnel in Germany pursuant to the Pre-Release Education Program (PREP) (38 USC §§ 1695-1698).

Notwithstanding 10 USC § 2306(b), which provides re contracts with the Army that:

Each contract * * * shall contain a warranty, * * * that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage brokerage or contingent fee, * * *

the state court has awarded, from the contract proceeds of a contract with the United States Army, a contingent fee to Rutcosky of five percent of all revenues generated for the first five years and two and one half percent of all PREP revenues generated in the following five years. The state court imposed this percentage contingent fee upon the entire gross PREP revenues of \$10,442,872 earned as of December 21, 1975.

Subsequently, in March, 1977, the trial court extended the judgment and its contingent fee assessment to a non-PREP educational agreement entirely funded by appropriations to the United States Army.

Both the original and extended judgments were appealed to the Washington State Supreme Court. After consolidation of both appeals, the court ruled in January of 1978 that Rutcosky had made an enforceable contingent fee agreement with the college's president in regard to the college's PREP proposal and program. Referencing 10 USC § 2303, it ruled 10 USC § 2306(b) inapplicable because the college was not paid from United States monies appropriated to the Army, but by assignment of individual soldiers' United States Veterans Administration benefits directly to the college. No mention whatsoever was made in regard to whether 10 USC § 2306(b) applied to the non-PREP contract paid for out of Army funds.

On June 9, 1978, the State Supreme Court denied the college's Petition for Rehearing on an eight-to-one vote and entered an order of mandate the same day (Appendix A).

JURISDICTION

This Writ of Certiorari is sought under the authority of 28 USC § 1257(3) and United States Supreme Court Rule 19(1)(a).

QUESTION PRESENTED

Does the prohibition against contingent fee arrangements contained in 10 USC § 2306(b) apply to an agreement to provide educational services to the United States Army, pursuant to the Pre-Release Discharge Program authorized in 38 USC §§ 1695-

1698, through which tuition and fees are funded by Veterans Administration benefits assigned to a college by matriculated military personnel?

STATUTES INVOLVED

Public Law 91-219, the Veterans Education and Training Act of 1970 (38 USC §§ 1695-1698), created the Pre-Release Education Program (PREP). It offers active duty military personnel courses for a secondary school diploma and post secondary education. 38 USC § 1698(a) provides that through the Secretary of Defense, the military branches shall provide training facilities and released time necessary to carry out the PREP program. The Veterans Administration is required to pay PREP participants an educational assistance allowance equal to the school's established charge for tuition, fees, books and supplies or the lesser sum of \$175.00 before 1972 amendments or \$292.00 per month after the 1972 amendments.

10 USC § 2303 and its companion sections of the Military Procurement Act apply to all military service contracts for which "payment is to be made from appropriated funds." Section 2306 of that Act prohibits certain types of procurement practices, such as cost-plus, and a percentage of costs agreement. It also requires disclosure of cost-plus fixed subcontracts, limits research and development cost to 15% of the contract, limits architectural fees, etc. 10 USC § 2306(b) requires a warranty that the contractor had not employed on a contingent fee basis

an independent contractor to solicit or obtain the military procurement contract. Contracts breaching this statutory contingent fee warranty may be annulled.

STATEMENT OF FACTS

In July of 1971 the Department of the Army sent a letter soliciting BBCC to prepare a proposal to provide high school and remedial education to Eighth Army personnel located in Germany. This was to be accomplished pursuant to the PREP program outlined in 38 USC §§ 1695-1698. BBCC was advised that on-duty classes were to be provided for all military personnel who enrolled.

In that same month, Rutcosky met with the college's President for the purpose of seeking ideas on grant proposals that might be developed. The college President agreed that the college would take care of Rutcosky if he prepared a response which the Army would accept.

Rutcosky then prepared the college's PREP proposal. He then commenced personal negotiations with the Army educational specialist who had been assigned the task of setting up the military's early PREP programs. On November 8, 1971, the United States government entered a contract with BBCC for provision of PREP program services to the United States Army (Appendix B).

The agreement between the United States and BBCC provided that educational services were to be provided to military personnel qualifying under the

PREP statutes. Payment for tuition of fees was to be made either by enrolled students or the Veterans Administration. The Army was to supply logistical support, including classroom facilities, clerical assistance, postal service, and commissary privileges.

The college commenced performance of its PREP contract in February, 1972. Rutcosky was sent to Germany as one of the area coordinators. Shortly thereafter Rutcosky notified the college of his copyright claim to the PREP proposal. He then advised the college President that he wanted payment from PREP revenues on a contingent fee basis.

Rutcosky filed a federal copyright infringement suit against BBCC which was dismissed in June, 1976.

The State Supreme Court disposed of 10 USC § 2306(b) with the following short paragraph:

* * * the college contends that Plaintiff's agreement is illegal as violative of 10 USC § 2306(b). Its argument fails. 10 USC 2306 references § 2304 (sic). That statute applies to procurement by the Armed Services. Here the contract specifically excluded any financial liability upon the Army. Rather, all compensation came from individual soldiers assigning certain Veterans Administration benefits directly to the college. The statute is not applicable to this agreement.

Within a week after receiving the State Supreme Court's conclusion that 10 USC § 2306(b) was inapplicable because the monies involved were private funds, the college received the attached copy

of a General Accounting Office communication to the administrator of the Veterans Administration. (Appendix E) The GAO communication incorporated an opinion by the V.A.'s General Counsel that implicitly reaches an opposite conclusion regarding the nature of the monies expended for PREP tuition and fees. V.A.'s General Counsel responded to the GAO query as to whether excess PREP tuition and fee revenues can be recaptured by the V.A.:

It is our view that the law all along has provided for reimbursement of costs.

These matters were noted in the college's Motion for Reconsideration which was denied by the State Supreme Court on June 9, 1978.

BBCC now finds itself on the horns of a federal-state dilemma. The Washington State Supreme Court considers PREP tuition and fees to be "private monies" subject to a 10-year contingent fee. Alternatively, the state court considered that these are not appropriated funds subject to 10 USC § 2303, and hence not included within 10 USC § 2306(b), since they were not directly appropriated to the United States Army. These specific federal appropriations are noted in footnote, page of this petition. The United States General Accounting Office and Veterans Administration, as reflected in Appendix E, regard these PREP tuition and fees to be monies subject to reimbursement to the federal agency from whence they came: the Veterans Administration.

REASONS FOR GRANTING THE WRIT

A. There is a Substantial Federal Question.

1. THE ISSUE IS OF NATIONWIDE IMPORTANCE.

The V.A. General Counsel's Opinion (Appendix E) refers to approximately 200 schools which have offered PREP programs. The nine PREP contractors audited by the GAO received nearly \$48,000,000. Although the PREP program has ceased for an interim period, it is scheduled to resume in 1979. The Washington State Supreme Court now offers the only precedent regarding the application of 10 USC § 2306(b) to the PREP law. The state court's ruling that tuition and fees payments expended in PREP were private monies not subject to 10 USC § 2303 could become a national precedent freeing PREP contracts from the federal restraints which are applicable to military procurement contracts. This case offers the only recent interpretation of the federal policy regarding contingent fee arrangements affecting military procurement contracts. The Washington State Supreme Court interpreted 10 USC § 2306(b) to be a mere technical statute and interpreted it in a vacuum free of public policy considerations.

2. THE FEDERAL PROHIBITION OF CONTINGENT FEE ARRANGEMENTS.

Reduced to its simplest terms, this case raises the issue of whether a contingent fee arrangement, such as the one at issue, should be set aside in deference to the federal law, 10 USC § 2306(b), and the long-standing public policy.

The concept of prohibiting contingent fee contracts between a military contractor, and one who procures a specific military contract for such contractor, is not new. In 1865 this Court declared in *Providence Tool v. Norris*, 2 Wall (69 U.S.) 45 that express contingent fee agreements to procure military contracts are so fraught with the potential for corruption that they must be deemed void because:

* * * consideration as to the most efficient and economical mode of meeting the public wants should alone control * * *. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction is against public policy. That agreements, and express contingent fee contracts to procure a specific rifle contract (* * *) have this tendency, is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of public funds.

The Court continues at page 54 at 2 Wall:

* * * (such contracts) * * * are void as against public policy without reference to the question of whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements.

The covenant against contingent fees contained in 10 USC § 2306(b) was born of this rationale. At § 42.20 of *Government Contracts*, McBride and Wachtel restates the history of this common law and statutory prohibition. They note that a covenant similar to that of 10 USC § 2306(b) has been util-

ized in United States Military contracts since 1918. In 1919 the clause was amended to provide an exception in the case of bona fide commercial representatives.

The original insertion of a clause prohibiting contingent fee arrangements in government military contracts was a matter of executive policy and continued as such until 1941. In that year Congress passed the first War Powers Act (Act of December 18, 1941 (55 Stat. 839)). Executive Order 9001 (December 27, 1941) issued pursuant to that Act, required the inclusion of a warranty against contingent fees.

The present wording of the covenant against contingent fees emanates from the Armed Services Procurement Act of 1948. 62 Stats. 23, §4(a). References to the legislative history regarding the rationale for the covenant demonstrates why it is such a fundamental part of military procurement policy.

Thus in the Senate Armed Services Committee's Report number 571, 80th Congress, Calendar number 597, July 16, 1947, the Senate Committee reported that one of the major purposes of the bill was to lift the peace time limitations upon Armed Services procurement that had generally permitted only advertising-bid methods of military procurement. The Committee notes at page 1 of its report that the Armed Services Procurement Bill:

During the House hearings on this Bill, which

were exhaustive in character, a thorough study of the various exceptions to the requirements for advertising was made. * * *

This Bill, as amended, (to include the covenant against contingent fees) makes uniform all the laws and rules governing purchase procedures for the Armed Services and repeals many obsolete and diverse laws.

Further explaining the amendment prohibiting contingent fee arrangements as well as other restrictions upon negotiated contracts, the Senate adopted a quote from the House Armed Services Committee Report that stated:

The Bill * * * holds to the time-tested method of competitive bidding. At the same time, it pulls within the framework of one law a century's accumulation of statutes and incorporates new safeguards designed to eliminate abuses * * *

In short, both the Senate and the House agreed that if an exception to the former limitations upon military procurement was to be made, it could only be accomplished within the framework of certain limitations.

The 1947 Senate Committee Report, at p. 18, indicated that when it added the present statutory requirement (10 USC § 2306(b)) that military contracts contain the covenant against contingent fees, it was

In order to guard against the possibility of a supplier retaining the services of a broker or agent to secure contracts from the agencies upon a contingent fee or similar basis.

Rutcosky's agreement to procure the Army's

PREP contract falls squarely within the scope of contingent fee arrangement that Congress reprehends. The Rutcosky agreement:

1. Was a contingent fee agreement entirely contingent upon RUTCOSKY obtaining a specific Army contract.

2. Impacted an Army procurement contract executed after RUTCOSKY participated in negotiations with military procurement personnel.

3. Portended a contingent fee reward so sizeable that the potential for corruption of the negotiation process was substantial. As will be subsequently noted, we are not contending that there has, in fact, been corruption.

B. Conflicts Among Circuits Must be Resolved.

Since promulgation of Executive Order 9001 (December 27, 1941), federal and state courts have charted divergent courses on the contingent fee issue. As McBride and Wachtel note in § 42.20 of *Government Contracts*, the federal circuit courts and state supreme courts have taken both liberal and conservative positions on the issue of whether the existence of a contingent fee arrangement, per se, voids such an agreement. The conservative and more prevalent position is expressed in *Mitchell v. Flintkote*, 185 F. 2d 1008 (2d Cir.-1951). Flintkote had retained Mitchell on a contingent fee basis to promote its reputation as a camouflage paint contractor among World War II government officials. Subsequently, Flintkote was placed on the government's list of con-

tractors to whom bid invitations were sent. After Flintkote won a bid contract, Mitchell sued for his contingent fee. Flintkote pled that Executive Order 9001 voided the contract between Mitchell and Flintkote, and the Second Circuit concurred. The Second Circuit refused to apply the rationale of some cases in which such arrangements were voided only if there was proof that something sinister had actually occurred. The court concluded,

* * * as Mr. Justice Holmes pointed out in *Hazelton v. Sheckells*, 202 U.S. 71, 79, 26 S. Ct. 567, 50 L.Ed. 939, it is the tendency to corruption, not what was done in the particular case that justifies the rule * * * Executive 9001 is vigorous in its requirements. The order flatly requires that no person be employed on a contingent fee to solicit or secure the contract. No exception is made for cases in which nothing sinister was contemplated or done under the terms of the contingent fee contract * * *

Similarly in *LeJohn Manufacturing Company v. Webb*, 22 F. 2d 48, 51 (D.C. Circuit 1955), the District of Columbia Court of Appeals voided a contingent fee agreement on the grounds that Executive Order 9001 had been breached. Webb had made an oral agreement entitling him to five percent of all revenues generated from electric fans sold to the military. The District Court enforced the contingent fee contract upon the rationale that there had been no proof of any political or sinister influence. The Circuit Court reversed, stating:

Actual evidence of improper conduct is not nec-

essary to render such agreement unenforceable. The law looks to the general tendency of such agreement; and it closes the door to temptation, by refusing them recognition in any of the Courts of the Country. *Providence Tool Company v. Norris*, 1864, 2 Wall 45 69 U.S. 45, 56.

Other cases following the "per se" approach include *Bradley v. American Radiator*, 159 F.2d 39 (2d Circuit-1947) and *United States v. Paddock*, 178, F.2d 394 (5th Circuit-1950), rehearing denied in 180 F.2d 121, Cert denied 1950, 340 U.S. 813.

Opposed to the Second, Fifth and District of Columbia Circuits "per se" approach is the "sinister intent" test outlined by the Third Circuit in *Browne v. R & R Engineering*, 264 F.2d 219 (1958). Like Mitchell of *Mitchell v. Flintkote*, Browne made an agreement to have a military contractor (R & R Engineering) placed upon a list of those invited to bid on certain defense contracts. Like RUTCOSKY, Browne's services went further and included helping the preparation of drawings, estimates and technical data required and/or considered useful in bidding. It was understood that payment for all services, except certain drawings, would be contingent upon success in getting Atomic Energy Commission contracts. The trial Court voided the contract after Executive Order 9001 was proffered as an affirmative defense.

The Third Circuit reversed. Noting that it was impressed by the fact that the trial Court made no finding that Browne had exerted any undue influence or did anything morally wrong, the Court regenerated the pre-executive order rationale of *Steele*

v. Drummond, 275 U.S. 199, 205 (1927), and stated that detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated. Accordingly, the Third Circuit concluded, since the parties had not fixed a sum certain for either the contingent fee portion of the agreement or the services portion of the agreement, it would allow Browne to recover on a quantum meruit basis for the services he had performed.

McBride and Wachtel chart these divergent courses in §42.20 of *Government Contracts* and conclude that the Courts are hopelessly divided. The anathama such confusion deals to the, common law created and legislatively ratified, public policy implicit in the 10 USC § 2306(b) prohibition requires a United States Supreme Court resolution of the issue.

C. The State Court Misconstrued 10 USC § 2306(b).

10 USC § 2303 provides that the Military Procurement Act applies to:

- "(a) * * * to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in Subsection (b), and all services, for which payment is to be made from appropriated funds:
- (1) The Department of the Army.
 - (2) The Department of the Navy.
 - (3) The Department of the Air Force.
 - (4) The Coast Guard.
 - (5) The National Aeronautics and Space Administration."

¹See 10 USC 2303 (b) & (c) Appendix F, for remainder of statute.

The State Supreme Court's ruling that (10 USC 2306(b)) is inapplicable because PREP tuition and fees had not been paid from funds appropriated to the United States Army as flies in the face of the public policy upon which the statute is based. In explaining the purpose of 10 USC § 2303, the Senate Armed Services Committee explained at page 5 of Senate Report Number 571, 80th Congress, First Session, the two major factual predicates that precipitate 10 USC § 2303 jurisdiction:

This section makes the coverage complete for [1] supplies or services to be paid for from appropriated funds and establishes the principle of one agency purchasing, or [2] making contracts for, the use of other agencies. [Numbering ours]

In other words, the military procurement law applies to services purchased from appropriate funds and makes 10 USC §2306(b) applicable whether the agency is purchasing for its own use or for another agency.

The instant case meets these jurisdictional requirements. Under the subject contract, PREP tuition and fees were paid by assignment of V.A. benefits paid from Congressional appropriations.²

²The following citations reference congressional appropriations made for support of the PREP program which is Chapter 33 of 38 U.S. Code:

1971: \$1,888,700,000 for 38 USC, Chapter 21, 31, and 33-39; P.L. 92-78, 85 Stat. 297; 8/10/71.

1972: \$2,224,400,000 for 38 USC, Chapter 21, 31, and 33-39; P.L. 92-383, 86 Stat. 547; 8/14/72.

1973: \$2,526,000,000; P.L. 93-137, 87 Stat. 497; 10/26/73.

1974: \$750,000,000; P.L. 93-261, 88 Stat. 76; 4/11/74.

1975: \$811,700,000; P.L. 93-624; 88 Stat. 2016; 1/3/75.

That BBCC's PREP contract was made for the benefit of the United States Army is also evident from a reading of the same. (Appendix D) Although it can be argued that the contract was made for the benefit of military personnel, the semantics involved in distinguishing between an Army contract that secures benefits for military personnel and an Army contract that assists Army personnel is almost impossible. BBCC's PREP program did provide consideration to the United States Army, since the contract provides for teaching of remedial skills, high school education and associate of arts degrees.

As earlier noted, the Veterans Administration and the General Accounting Office have taken the position that all monies paid to BBCC pursuant to the PREP contract may be reclaimed by the V.A. acting on its own account. That position accords with the above analysis. Moreover, the BBCC-Army PREP contract obligation of the Army to increase its logistical support to BBCC in case of reduced tuition and fees manifests the governmental interest in this contract.

Nor can the argument be made that the statutorily required covenant against contingent fee agreements is waived by failure of the Army to insert the required boiler plate language. That the negligence of a federal employee cannot waive a public policy of the United States or federal law is a principle well established. See, *Mitchell v. Flintkote*, 185 F. 2d 1008 (2d Cir. 1953) re contingent fees.

In short, this case must be viewed as one requiring application of the public policy implicit in the statute. This court utilized the public policy of the Anti-Kickback Act, 41 USC § 51, to fill in the interstices of that statute in *United States v. Acme Process Equipment Company*, 385 U.S. 138 (1966), and should also do so in the instant case.

In *Acme*, the United States sought to void a contract with a gun manufacturer that had entered into kickback arrangements with subcontractors. The contractor was acquitted of the criminal offense because the law did not apply to fixed fee contracts.

When the United States refused to pay the contract, Acme secured a Court of Claims judgment in its favor. This Court noted that if Congress limited the act to fixed fee contracts, it was only because other types of negotiated contracts were rarely utilized in 1946. Congress was seeking to prohibit a generic evil—not to effect a technical, wooden prohibition limited to certain types of contracts. This Court then filled the hole in the statute by concluding that the public policy embodied in the Anti-Kickback Law required that the United States be able to void the contract. In so concluding, the following statement was made:

* * * As this Court said about the conflict-of-interest statute in *United States v. Mississippi Valley Company*, *supra*, 364 U.S. at 565 5 L. Ed. 2d at 297, it is appropriate to say that it is the 'inherent difficulty in detecting corruption which requires that contracts made in violation of * * * the Anti-Kickback Act be

held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent.'

CONCLUSION

The Washington State Supreme Court has emasculated the federal statute and has judicially compromised the public policy of opposing contingent fee agreements on federal contracts. We respectfully submit that 10 USC § 2306(b) renders invalid the contingency fee for Mr. Rutcosky. We further submit that the rationale expressed by this Court in *Acme*, *supra*, also supports our request for reversal of the state court decision.

Dated this 5th Day of September, 1978.

Respectfully submitted,

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